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No. 91-1106

In the Supreme Court of the United States

OCTOBER TERM, 1991

TRANSAMERICA INSURANCE COMPANY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the statute of limitations for the United States' action against the sureties of a bankrupt grain storage company began to run upon receipt of an anonymous tip left under an office door.

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OPINIONS BELOW

The opinion of the court of appeals, Pet. App. A1-A6, is reported at 946 F.2d 581. The opinions of the district court, Pet. App. A7-A15, are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 7, 1991. The petition for a writ of certiorari was filed on January 6, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Beginning in July, 1979, the Commodity Credit Corporation (CCC), a wholly owned government corporation, 15 U.S.C. 714-714p, contracted with Ghent Grain and Feed, Inc., to store grain. Ghent submitted a financial statement at the time it entered into the contract, and thereafter it submitted semiannual financial reports and annual financial statements. CCC evaluated Ghent's performance as satisfactory, and it renewed the storage contract on a yearly basis until 1983.

On August 15, 1983, two months after an annual review and CCC's decision to renew Ghent's contract, an anonymous party slipped a document under the door of a CCC satellite office. The document, a Ghent draft financial statement containing pencilled corrections, suggested by implication that Ghent had greatly misstated its assets. Pet. App. A2; Pet. 3-5 & n.3.

Within eight days, the government initiated an investigation. The investigation confirmed irregularities at the warehouse and a grain shortage. On August 26, 1983, CCC suspended Ghent's operating license, and it later ordered that Ghent deliver the stored grain by October 15, 1983. Pet. App. 3. Ghent failed to deliver the grain and instead, on November 1, 1983, filed for bankruptcy protection. Ghent's assets were eventually distributed in the bankruptcy proceeding.

After the distribution, CCC held uncompensated grain receipts with an estimated value of $205,738. The government requested that sum from Ghent's sureties, petitioners Transamerica Insurance Company and Tri-State Insurance Company of Minnesota. They refused to pay. The United States then filed this action on

August 18, 1989, seeking recovery from Transamerica and Tri-State under the surety bonds they issued. Pet. App. A2-A3; C.A. App. 54-55, 56-57; Pet. 7-8.[1]

2. The district court ruled that the United States' action was time barred, because the claim was filed three days beyond the six-year statute of limitations. See 15 U.S.C. 714b(c).[2] The district court concluded that the claims against the sureties based on Ghent's fraudulent concealment of its grain shortfalls accrued on the date that the CCC discovered the document anonymously slipped under the CCC office door, rather than on the date that the CCC officials had ascertained the accuracy of the information suggested therein. Pet. App. A9-A10. The court reasoned that the receipt of the anonymous tip was a "notice of a possible claim." *Id.* at A10.

3. The court of appeals reversed. It held that "an anonymous tip, such as received here, does not put a person on sufficient notice of the facts indicated in the tip to trigger a statute of limitations until a reasonably prompt investigation either identifies the source as probably reliable or shows the information as probably

[1] The United States delayed the filing of its legal action against the sureties after discussions with the sureties indicated that the bankruptcy distribution and other ongoing state court litigation would provide full satisfaction of its claim. See C.A. App. 49-60.

[2] Section 714b(c) states in relevant part:

> No suit by or against the [Commodity Credit] Corporation shall be allowed unless * * * it shall have been brought within six years after the right accrued on which suit is brought * * *.

accurate." Pet. App. A3-A4. The court observed that there was "little case law to guide this narrow decision." *Id.* at A5. It noted that in the typical case involving the receipt of information that may have put a plaintiff on notice of a claim, the issue is "whether plaintiff properly evaluated the information received, not whether the information was accurate." *Id.* at A6. "Accuracy is the big question as to *any* information provided anonymously. Some reasonable time must be afforded to answer that question." *Ibid.* The court accordingly held that the action was timely as to all of the United States' claim.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or another court of appeals. The court simply applied an established rule to the particular and unusual factual situation presented here. Further review is unwarranted.

1. The court of appeals stated that in the case of a fraudulently concealed claim, "a cause of action accrues and the statute of limitations begins to run when the plaintiff receives notice of a possible claim and not later when the plaintiff verifies the existence of the claim. *See Goellner* v. *Butler*, 836 F.2d 426, 432 (8th Cir. 1988); *Bader* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 644 F.2d 690, 693 (8th Cir. 1981)." Pet. App. A4. Petitioners agree that this is the established and appropriate rule. Pet. 17 & n. 8. Thus, the only question here is whether the court of appeals correctly applied that settled test to the particular factual situation presented in this case.

2. The court properly ruled that the government's receipt of an anonymous tip should not be treated as "notice of a possible claim" until the government has had "the opportunity to conduct some investigation of one of two things: either the identity of the tipster which would validate the probability of the essential accuracy of the information, or sufficient facts to verify the probable accuracy of the information so received." Pet. App. A4-A5. As the court explained, an anonymous tip may provide a basis for investigation, but it does not have sufficient reliability, by itself, to serve as notice of a possible claim. Thus, it is appropriate to continue to toll the statute of limitations "until a reasonably prompt investigation either identifies the source as probably reliable or shows the information as probably accurate." *Id.* at A4.

3. There is no reason for further review of this matter. Contrary to petitioners' assertions, the court of appeals has not "grafted a new exception" to an established rule (Pet. 16), nor has it adopted an "actual knowledge" test (Pet. 18). The court's "narrow decision" (Pet. App. A5) simply holds that a mere anonymous tip like the one received here is not by itself notice of a possible claim. Petitioners were unable to direct the court of appeals to any prior decision addressing that novel question, *ibid.*, and they cite no such decision in their petition for a writ of certiorari. See Pet. 19-21. Thus, there is no pressing need for this Court to resolve this interlocutory issue of first impression, which is likely to arise with no greater frequency in the future than it has in the past.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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